IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 169 OF 2000

Shri Benny Fernandes,
s/o Marshal Fernandes,
about 28 years of age,
r/o H.No.89, Ambaulim,
Quepem, Goa. ... Appellant

Versus

1. Shri John Agnelo Fernandes,
r/o H. No.815, Near Fish
Market, Bepquegal,
Curchorem, Goa, and

2. The National Insurance Co. Ltd.,
2nd Floor, Marchon Bldg.,
Opp. Lohia Maidan,
Margao, Goa. ... Respondents.

Mr. V.G.P. Dukle, advocate for the appellant.

Mr. S. S. Kakodkar, advocate for respondent no.1.

Mr. E. Afonso, advocate for respondent no.2.

CORAM : A. P. LAVANDE, J.

DATE : **18th March, 2005.**

ORAL JUDGMENT

The appellant who was the claimant in Claim Petition No.211/92 before the Motor Accident Claims Tribunal, South Goa, Margao, challen0ges the Judgment and Award dated 6th December, 1999, dismissing the Claim Petition filed by the appellant claiming

compensation of Rs.l,00,000/- . The appellant shall hereinafter be referred to as "the claimant".

2. Briefly, the case of the claimant is that on 16th January, 1992, at about 4.00 p.m. at Borimol on the Curchorem-Quepem road, respondent no.1 drove a two wheeler bearing registration no.GDH 7962 in a rash and negligent manner and dashed against the scooter bearing No.GA-02-B-2732 driven by the claimant. As a result of the clash the claimant was thrown off the road and he suffered injuries, namely fracture of the right hand thumb and injuries to the shoulder and head. The petition was contested by respondent no.2. According to respondent no.2, the respondent no.1 was driving the scooter at a moderate speed with his wife as pillion rider from Margao to Sanvordem and at Borimol, respondent no.1 saw a scooter with two pillion riders coming in the opposite direction. The said scooter went on the wrong side in a high speed. It was further the case of respondent no.2 that the said scooter was not driven by respondent no.1, but by one Harischandra Malvonkar and that the accident occurred on account of rash and negligent driving of the scooter by the claimant himself. On the basis of the pleadings the following issues were framed:-

1. Whether on 16.1.92, at about 4.00 p.m., at Borimol, near house of Ramchandra Dukle, on Curchorem-Quepem Road, respondent no.1

drove scooter no. GDH 7962 in a rash and negligent manner and dashed against scooter no. GA-02/B- 2732, driven by the applicant, as a result of which the applicant was thrown off the road and suffered injuries. O.P.C.

2. Whether the applicant was 1 years old, was earning Rs.l,500/- and is entitled to a total compensation of Rs.l,00,000/- . O.P.C.
3. Whether scooter No.GA-02/B- 2732, was being driven by Harischandra Malvankar, who did not possess driving licence and three persons were travelling on the said scooter due to which respondents are not liable to pay any compensation. O.P.R.

3. The Claims Tribunal after appreciating the evidence led by the claimant held that the claimant had failed to prove that the accident had occurred on account of rash and negligent driving by respondent no.1. The Claims Tribunal also held that the scooter driven by respondent no.1 had dashed against the scooter driven by the said Harischandra after the claimant and the two pillion riders had fallen on the road and, as such, the injuries were not caused to the claimant on account of rash and negligent driving of respondent no.1. The Claims Tribunal held that Harischandra was driving the scooter and not the claimant, based on the findings given in Claim Petition No.207/92 filed by the wife of respondent no.1.

4. Having regard to the pleadings and the Judgment and Award given by the Claims Tribunal, the following points arise for determination in the Appeal:-

1. Whether the respondent no.1 drove the scooter in a rash and negligent manner causing injuries to the appellant?

2. If yes, to what compensation the claimant is entitled?

5. Mr. Dukle, learned counsel appearing for the claimant submitted that the Tribunal could not have placed reliance on the judgment in Claim Petition No.207/92 filed by the wife of respondent no.1 holding that it was Harischandra who was driving the scooter and not the claimant. He further submitted that the Tribunal has misconstrued the evidence led by the applicant and more particularly the evidence of Benny Fernandes, (C.W.2), Santolino Carvalho (C.W.4), Manuel Fernandes (C.W.5) and Francisco Fernandes (C.W.8). Mr. Dukle further submitted that the version given by respondent no.1 herein who has examined himself as R.W.1, cannot be believed. The learned counsel further submitted that in any case the doctrine of contributory negligence is applicable in the present case. Lastly, the learned counsel submitted that applying the doctrine of last opportunity, the claimant is entitled to the compensation because it was possible for the respondent no.1 to avoid the accident. Mr. Afonso, learned counsel appearing for

the respondent no.2, submitted that the evidence on record clearly establishes that at the relevant time the claimant was driving the scooter with two pillion riders and the claimant and the two pillion riders fell on the ground in the middle of the road and the scooter driven by respondent no.1 dashed only against the scooter driven by the claimant and not against the claimant or any of the pillion riders. The learned counsel further submitted that the doctrine of contributory negligence or principle of last opportunity is not attracted having regard to the evidence led by the claimant. The learned counsel further submitted that the Tribunal was absolutely justified in dismissing the Claim Petition inasmuch as the finding given by the Tribunal that there was no rashness and negligence on the part of respondent no.1 cannot be faulted. Mr. Kakodkar, learned counsel appearing for respondent no.1 adopted the submissions made on behalf of respondent no.2.

6. In the Claim Petition, the claimant examined eight witnesses. According to the Tribunal, the vehicle driven by respondent no.1 dashed against the scooter driven by the claimant after the claimant and the two pillion riders had fallen on the ground. The Tribunal held that the evidence led by the applicant did not establish that the injuries were caused on account of the dash given by the scooter driven by respondent no.1. In view of this finding it is necessary to find out whether this finding is borne out by the evidence on record. The

evidence of Benny Fernandes (C.W.2) clearly establishes that it was the scooter which dashed against the scooter driven by him after he and the two pillion riders had fallen from the scooter. According to the claimant he and Harischandra were taking Celina to the doctor as she was sick. At this stage it is pertinent to note that Celina D'Costa who has been examined as C.W.1, does not state that she was sick and, therefore, she was being taken on the scooter. That apart, she in her evidence, does not make any reference about any dash being given by the scooter driven by respondent no.1 on the scooter driven by the claimant. She has only stated that the scooter driven by the claimant skidded and all three of them fell down on the road sustaining injuries. Santolino Carvalho (C.W.4) in his evidence also states that the scooter driven by respondent no.1 gave a dash against the scooter driven by the claimant which had fallen on the road. The evidence of Manuel Fernandes (C.W.5), who claims to be an eye-witness, establishes that the scooter driven by respondent no.1 dashed against the scooter driven by the claimant after the claimant and two pillion riders had fallen on the road. At this stage it is pertinent to note that Dr. Ravindra Parulekar (C.W.6) and Dr. Shyam Talwadkar (C.W.7) who have been examined to prove the injuries have not stated that the injuries could be caused on account of impact of scooter while the appellant was driving the scooter. This assumes importance in view of the fact that it is the case of the claimant himself

that on account of the oil on the road the scooter driven by him skidded and he and the two pillion riders fell on the road. Since admittedly, the claimant and the two pillion riders fell on the road after the scooter skidded on account of oil on the road, the injuries being sustained by the claimant on account of the fall on the road cannot be ruled out. In view of the stand taken by the claimant himself it was the duty of the claimant to prove that the injuries were caused on account of the dash given by the scooter driven by respondent no.1 and that the respondent no.1 was driving the scooter in a rash and negligent manner. The evidence of Francisco Fernandes (C.W.8), who claims to be an eye-witness, also establishes that the scooter driven by respondent no.1 dashed against the scooter driven by the claimant after it had fallen on the road. In the present case, the impact of the scooter driven by respondent no.1 against the scooter driven by the claimant was almost in the middle of the road. Having regard to the evidence led by the claimant, as stated above, it is clear that the scooter driven by the respondent no.1 had dashed only against the scooter driven by the by the claimant after it had fallen on the ground. There is absolutely no evidence led by the claimant to prove that on account of the dash given by the scooter driven by respondent no.1, the claimant sustained any injury. If the scooter driven by the claimant had skidded on account of the oil on the road, resulting in the fall of the claimant and the two

pillion riders on the road and thereafter the scooter driven by respondent no. 1 dashed against the scooter which had fallen on the road, no rashness or negligence can be attributed to respondent no.1 in driving the scooter. Having regard to the evidence led by the claimant himself, the question of contributory negligence does not arise. I am also unable to accept the submission of the learned counsel that the principle of last opportunity is attracted in the present case. It is in evidence of respondent no.1 that the scooter driven by the claimant had fallen at a distance of about 5 mts. from the scooter driven by him. If the version given by respondent no.1 is accepted and there is no reason not to accept his version, then the fact remains that it could not be expected of respondent no.1 to suddenly stop his scooter after he saw the scooter driven by the claimant falling on the ground at a distance of about 5 mts. from his scooter. Although the statement made by respondent no.1 in his cross-examination that his scooter did not dash against the scooter driven by the claimant cannot be accepted, that by itself does not prove rashness and negligence on the part of respondent no.1. The burden to prove rashness and negligence was squarely on the claimant, which he has failed to discharge. I am unable to accept any of the submissions made by the learned counsel appearing for the appellant. The Tribunal is absolutely right in giving a finding that the claimant had failed to prove rashness and negligence on the part of respondent no.1

The evidence on record clearly establishes that it was the claimant himself who was responsible for the accident, may be on account of the oil which had fallen on the road resulting in the skidding of the scooter driven by him. Although the submission made by the learned counsel appearing for the appellant that the Tribunal could not have given a finding that it was Harischandra who was driving, on the basis of the investigation officer, who was not an eye-witness and also on the basis of the finding given by the Tribunal in another Claim Petition, has some weight, still the fact remains that this by itself does not advance the case of the claimant any further. Even if it is held that it was the claimant who was driving the scooter, still the claimant has not been able to prove rashness and negligence on the part of respondent no.1. The learned counsel appearing for the appellant has relied upon some judgments. I deem it not necessary to refer to them since they are not applicable having regard to the facts and circumstances of the case.

7. In view of the above discussion, I do not find any merit in the appeal and, accordingly, the appeal is dismissed. The parties are left to bear their own costs.

A. P. LAVANDE, J.

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